UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
	)	
Frank Acierno	)	**Docket No. CWA-03-2005-0376**
Christiana Town Center, LLC	)	
	)	
	)	
Respondents	)	

ORDER DENYING MOTIONS TO DISMISS AND TO SUPPRESS AND GRANTING MOTION FOR LEAVE TO AMEND COMPLAINT

This proceeding under Section 309(g) of the Clean Water Act (33 U.S.C. § 1309(g)), was commenced on September 29, 2005, by the issuance of a complaint by the Director of the Water Protection Division, U.S. Environmental Protection Agency, Region 3, charging Respondents, Frank Acierno and Christiana Town Center, LLC, with violations of Section 301 of the Act (33 U.S.C. § 1311). Specifically, the complaint alleges that Respondents failed to comply with NPDES General Permit requirements for storm water discharges at the Christiana Town Center ("Christiana" or "the Site") located in White Clay Creek Hundred, New Castle County, Delaware, by failing to comply with an applicable Sediment and Stormwater Plan, and thus with the permit, and/or operating without such a plan. It is alleged that Respondent Acierno is the owner of Christiana Town Center, LLC ("Christiana"). For these alleged violations, it was proposed to assess Respondents a penalty totaling $157,500.

Respondents, through counsel, filed an answer under date of October 27, 2005, denying the alleged violations and requested a hearing. The answer included some 26 affirmative defenses including lack of personal and subject matter jurisdiction, failure to name indispensable parties, i.e., New Castle County, Delaware or the [Delaware] Department of Natural Resources and Environmental Control ("DNREC"), statute of limitations, laches, unclean hands, estoppel, res judicata, collateral estoppel, unlawful search, double jeopardy, due process and equal protection violations, failure to exhaust administrative remedies, imposition of excessive fines, failure to satisfy conditions precedent to the institution of this proceeding, EPA bad faith, and fraud. The answer included a Motion to Suppress and Dismiss Allegations Arising From Unlawful Search and a Motion to Dismiss Acierno Completely and Christiana Partially. These motions are addressed more specifically below.

I. BACKGROUND

It appears that the Site consists of at least 137 acres and that 100 percent of the Site has been or is currently disturbed (Complaint, ¶¶ 12 and 13). It further appears that part of the Site has been developed, consisting of a shopping mall with attendant stores, restaurants, and other commercial establishments, while other portions of the Site are set aside for future development. EPA, accompanied by a representative of New Castle County, inspected areas of the Site accessible to the public on March 9, 2004. Christiana has, however, persisted in its refusal to permit EPA inspection of the non-public areas of the Site. Reasons for this refusal are set forth in Christiana's Motion to Quash Administrative Search Warrant and Excluding All Evidence Arising therefrom, dated May 6, 2004 (Answer, Exhibit A), and correspondence with EPA concerning a proposed inspection and Christiana's reasons for refusing permission for such an inspection (Answer, Exhibits B-D). The proposed inspection appears to have been discussed in a telephone conversation with counsel on February 27, 2004, and thereafter counsel for Christiana wrote a letter to EPA counsel explaining Christiana's objection to an unbridled EPA inspection as essentially two fold : 1) EPA no longer has jurisdiction over the site; and 2) the EPA cannot satisfy the legal standard for obtaining the legal right to a nonconsensual entry onto the land (letter, dated March 2, 2004). In support of the first contention, Christiana asserts that the NPDES General Permit obtained from the DNREC terminated by its own terms when Christiana completed final site stabilization in accordance with the Delaware Sediment and Storm Water Regulations in October 2003.[1] Secondly, Christiana asserts that EPA has not provided any proof that reasonable legislative or administrative standards for conducting an inspection are satisfied, or that probable cause is present based upon specific evidence of an existing violation. Christiana maintains that no evidence of an existing violation exists and that the Site is in full compliance with State and County law.[2]

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[1] Section 9 of the State of Delaware Department of Natural Resources and Environmental Control Regulations Governing the Control of Water Pollution is entitled "The General Permit Program" and Subsection 1 is the "Regulations Governing Storm Water Discharges Associated with Industrial Activities". Part 2 of Subsection 1 is "Special Conditions For Storm Water discharges Associated With Land Disturbing Activities". Section 9.1.02.6 is entitled "Effective Date of Coverage" and § 9.1.02.6 A provides that "©overage under this Part begins when the Department has been notified pursuant to the provisions outlined in § 9.1.02.3 of this Part.. Subsection 9.1.02.6 B "Termination of Coverage" provides that "[c]overage under this Subsection continues until final site stabilization has been approved in accordance with the Delaware Sediment and Stormwater Regulations".

[2] This assertion is based in part on New Castle County Department of Land Use Sediment and Stormwater Report/CCR Review documents, dated October 7, 2003 and October 13, 2003, by Sebastiano Addalli, a certified construction reviewer, that the site was in compliance, reviewed and approved by Gejza J C Soltko, a registered professional engineer (attachments to Christiana's letter, dated March 8, 2004). These documents are required by the Stormwater Regulations for projects of 50 acres or more. As noted infra, however, there are allegations that Christiana's own reports to the County reflected violations of the General Permit (Opposition of United States to Christiana Town Center's Motion to Quash at 10, Reply [Response] Exhibit 3, infra note 3).

Counsel for EPA replied to the mentioned letter under date of March 4, 2004, stating, inter alia, that Christiana's analysis of EPA's authority to fulfill its responsibilities under the Clean Water Act ("CWA") was incorrect and that CWA § 308(a) provided broad authority for EPA to conduct inspections of sites to determine if violations are occurring or have occurred. The letter warned that, if your client refuses to allow the inspection, EPA would seek a search warrant to conduct the inspection. By letter, dated March 8, 2004, counsel for Christiana reiterated arguments previously advanced as to EPA's lack of authority to inspect the non-public areas of the Site, pointing out that "you (EPA counsel) have not articulated any basis to believe that there is an existing violation at the Site nor has any proof been provided that EPA can satisfy any reasonable standard for conducting an inspection." Moreover, even if a reasonable standard for conducting an inspection were satisfied, Christiana argued, the scope of any such inspection would be limited to: 1) "inspection of any 'monitoring equipment or method required under § 308(a)(A)' or 2) sampling ' any effluent which the owner or operator of such source is required to sample' under § 308(a)(A)". Christiana asserted that no monitoring requirements were imposed upon it under the DNREC general permit program and that it was not required to sample any effluent at the Site. Christiana contends that access is only permitted on premises where an "effluent source" is located, which, according to Christiana, is defined as a location where pollutants are being discharged. This assertion is based upon the language of CWA § 308(a)(B) which gives the Administrator or his authorized representatives a right of entry upon any premises "where an effluent source is located….". Christiana states that because land disturbing/construction activities at the Site have been completed, no pollutants are being discharged to waters of the United States at the Site. Additionally, Christiana says that no such activity could be occurring as a matter of law because the permit has expired by its terms and [by] completion of the project.

II. ADMINISTRATIVE WARRANT

On April 28, 2004, the United States Attorney on behalf of EPA filed an ex parte application in the United States District Court for the District of Delaware for an administrative warrant pursuant to CWA § 308(a) to enter and inspect the Christiana Town Center, located at Route 273, Brown's Lane and Main Street, White Clay Run Hundred, New Castle County, Village of Christiana, Delaware.[3] The warrant was issued on April 28, 2004, by United States Magistrate Judge Mary Pat Thynge (Reply Exhibit 2) and EPA, accompanied by a representative of New Castle County, conducted an inspection of the Site on May 4, 2004. Violations alleged in the complaint are based in part on evidence obtained during this inspection.

On May 6, 2004, Christiana Town Center filed a Motion to Quash Administrative Warrant and to Exclude Inspection Findings. The Motion alleges, inter alia, that EPA was never able to articulate any particularized suspicion of any ongoing violations at the Site or, indeed,

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[3] *In The Matter of: Christiana Town Center*, Docket No. MC 04-79 (U.S. DC, Del., April 26, 2004). This is Exhibit 1 of Exhibits 1 through 7 of Complainant's Reply to Portions of Respondents' Answer Captioned "Motions", hereinafter "Response Exhibit" followed by the number.

that it even had jurisdiction over the Site (Motion, ¶ 4). Christiana states that the Site was stabilized and improved in accordance with a County approved Erosion & Sediment Control Plan (Motion, ¶ 11) and points to two Certified Construction Review Reports, dated October 7, and October 13, 2003 (supra note 2), as evidence of compliance. Accordingly, Christiana contends that EPA lacked jurisdiction to regulate and inspect the Site after October of 2003 even though Christiana acknowledges that the NPDES general permit issued by DNREC remained in effect until November 17, 2003.[4] Therefore, Christiana asserts that it is clear EPA was undertaking nothing more than a fishing expedition to assist the County in its ongoing plan and scheme to deny Christiana its right to use and develop its property.

Christiana also finds fault with the fact that the warrant was sought on an "ex parte" basis, pointing out that EPA was fully aware of outstanding legal and factual issues regarding conditions at the Site and that EPA was fully cognizant of legitimate questions Christiana had raised concerning EPA's jurisdiction over the Site (Motion, ¶ 9). Christiana says that, if it had been notified of EPA's pursuit of the warrant, it would have contested the application and sought a *Franks* hearing,[5] because the Affidavit supporting the search warrant contains false information and assertions made with reckless disregard for the truth (id. ¶ 10). Christiana alleges that paragraph 9 of Mr. Schadel's Affidavit is in many respects completely false and inaccurate (id. ¶ 13). Additionally, Christiana says that EPA's bad faith in seeking the warrant on an "ex parte" basis is only to be outdone by its patently obvious efforts to abuse its authority to assist the County in furthering an unlawful scheme to deny Christiana the right to use and develop the Site (id. ¶ 14). Christiana points out that the same general issues raised by EPA concerning the Site are already at issue in pending litigation in the Delaware Court of Chancery, styled *New Castle County v. Christiana Town Center, LLC,* Civil Action No. 20604-NC. [6]

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[4] Id. Because the Delaware permit apparently expired on September 14, 2003, EPA took the position that Christiana's permit also expired on that date (Affidavit of Mr. Charles Adam Schadel, an EPA environmental engineer, in support of the United States' Ex Parte Application For Administrative Warrant, ¶ 9.). Although EPA argues that its right to inspect is not dependent on the duration of the permit, it says it has reconsidered this issue and now contends that any storm-water permittee, such as Christiana, who submitted a valid Notice of Intent to be covered by the [General] Storm Water Permit during its five-year life, remains subject to the General Permit's terms and conditions and must comply therewith, unless and until it is specifically requested to submit an individual permit application by the State of Delaware (Opposition, infra note 5, at 8, 9). This also seemingly means that Christiana may not be charged with discharging without the requisite permit, which in turn is dependent on whether it has an approved Sediment and Stormwater Management Plan (Complaint, ¶¶ 74-76).

[5] *Franks v, Delaware,* 438 U.S. 154 (1978). In *Franks* a criminal defendant was permitted to challenge the truthfulness of factual statements made in an affidavit supporting a search warrant, but only after the defendant had made allegations of deliberate falsehood or reckless disregard for the truth, and supported those allegations with an offer of proof.

[6] This is among civil actions between New Castle County, the Delaware Department of Transportation and Christiana Town Center, LLC et al. included in a Settlement Agreement and

According to Christiana, this litigation is ongoing and EPA's actions in this matter are simply a subterfuge to assist the County in obtaining additional evidence to buttress its unsupported and frivolous action against Christiana (id.).

Christiana contends that EPA lacked probable cause to justify issuance of the warrant, alleging that EPA did not present any specific evidence of existing violations at the Site (Motion ¶¶ 15, 16). Christiana says it was in full compliance with the NPDES permit as long as it had instituted measures at the Site in conformance with an approved Erosion & Sediment Control Plan. Although the status of a Sediment & Erosion Control Plan, dated January 10, 2003, submitted to the County by Christiana, is not clear, Christiana alleging that the Plan was tentatively approved on January 13, 2003, while the proposed Amended Complaint alleges the New Castle County Department of Land Use (NCCDLU) denied that it approved the Plan (id. ¶ 59). In any event, Christiana maintains that a Plan, approved April 24, 2002, had never been revoked and remained effective. Christiana asserts that an NPDES permit is fully closed out at such time as an approved Erosion & Sediment Control Plan is fully implemented and completed. Christiana claims that the project was complete and that no more construction activities were contemplated. Curiously, however, the Motion does not specifically allege that an Erosion & Sediment Control Plan was fully implemented and completed. As indicated hereinafter, EPA relies on observations made at the time of the inspection of the public areas of the site and from an adjacent parcel on March 9, 2004, for indications that the Site had not undergone final stabilization and that storm water controls required by the NPDES General Permit had not been completed (Schadel Affidavit at 3,4; Response Exhibit 1).

The United States opposed the Motion, pointing out, inter alia, that because the inspection had been completed, the Motion to Quash was moot and, even if the Motion were treated as a motion to suppress, the Motion was premature because Respondents were required to exhaust their administrative remedies.[7] In this regard, the inspection report did not appear to have been completed at the time and EPA had not taken enforcement action as a result of the inspection. The United States relies on what it says "is the well-established rule that questions of suppression should not be considered until the time when the Government seeks to use the evidence" (Opposition at 3 (citing *National Standard Co. v. EPA*, 881 F. 2d 352 (7th Cir.1989)). Contrary to Christiana's arguments, the United States contended that it may obtain a warrant "ex parte" even when surprise is not necessary and that, in fact, "ex parte" proceedings are the normal means by which warrants are obtained in both criminal and administrative actions (id. 4). The United States asserts that Christiana has not pointed to the specific portions of the Schadel Affidavit which are alleged to be false, nor has it made an offer of proof in that regard and thus, Christiana has not met its burden of entitlement to a *Franks* type hearing. Regarding Christiana's claim that there is no evidence of [failures to comply with Control Plan requirements] or of additional construction activity, the United States emphasizes that the Court issued the warrant. Additionally, the United States points out that the Control Plan, dated April 23, 2002, and the

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Mutual Release executed by the parties on December 12 and 13, 2005, attached to Respondents' Opposition to Complainant's Motion for Leave to File an Amended Complaint, referred to infra.

[7] Opposition To Christiana Town Center's Motion To Quash Administrative Warrant And To Exclude Inspection Findings ("Opposition", dated May 20, 2004) at 1, 2 ; Response, Exhibit 3).

Control Plan, dated January 10, 2003 (Reply, Exhibit 1), show that the basin was divided into two bays, while the inspector observed only one bay during his March 9 inspection (Opposition at 6, 7). As additional evidence of potential violation of the Control Plans, the United States points out that both Control Plans required Christiana to stabilize the undeveloped portion of the Site and that the March 9 inspection found dirt in the undeveloped area which did not appear to be stabilized (id. 8). Moreover, the United States says that the inspection on March 9, 2004, did find evidence which strongly suggested that construction was ongoing, i.e., an undeveloped area of gravel in need of additional grading, storm water conveyances which had not been installed, and construction equipment (bulldozers & dump trucks) located on the Site. Also, the United States alleges that the inspection pursuant to the warrant on May 4, 2004, did find ground disturbing equipment in operation thus indicating that construction activity at the Site was ongoing.

EPA alleges that it wanted to inspect the Site for two purposes: one, was to see if Christiana had complied with the General Permit during the term of the Permit and the second, was to see if Christiana was engaged in construction activities that were causing discharges not authorized by the Permit (id. 9). The United States alleges that whether the General Permit was still in effect in no way affected its need to determine if Christiana complied with the Permit during its term and that EPA was empowered to determine if Christiana was engaged in construction activity that was causing discharges not authorized by a permit. Additionally, the United States asserts that Christiana's contention that EPA needed proof of jurisdiction in order to inspect was based on a false premise, in that EPA was entitled to inspect to determine if jurisdiction exists (Opposition at 10). In seeking the warrant, EPA relied primarily on the March 9 inspection of the public areas of the Site and an inspection of those areas from an adjoining parcel. As described in the Schadel Affidavit, the inspection revealed evidence of existing violations and continuing construction activities. Additionally, it is alleged that reports submitted to the County by Christiana indicated violations of the General Permit.

In an Amended Memorandum, dated June 10, 2004, the Court denied the Motion to Quash, *In re Search Warrant* (2004 WL 1368848 (D.Del 2004); Response, Exhibit 4). Because the warrant had already been executed, the Court treated the Motion as a motion to suppress. The Court noted that before judicial review of a motion to suppress was proper, the moving party must exhaust all administrative remedies and because Christiana had not applied to EPA's administrative tribunal, apparently the Environmental Appeals Board, for relief and EPA had taken no action against Christiana based on findings obtained by the inspection pursuant to the warrant, Christiana's motion was premature (Memorandum at 4). The Court further noted that allegations of bad faith in obtaining or issuance of a warrant were issues that could be raised in subsequent administrative proceedings, that a lower standard of probable cause was required for administrative warrants than what is necessary in a criminal proceeding and that, in accordance with the facts presented, EPA had adequately demonstrated probable cause for the issuance of an administrative warrant (id. 5-7). The Court pointed out that " ex parte" proceedings for obtaining search warrants are normal practice, are not evidence of bad faith and, in fact, may be necessary for effective enforcement (id. 7, 8). The Court ruled that Christiana was not entitled to notice of the application for a warrant. Because EPA had not used any of the information obtained by the Site investigation, the Court ruled that a *Franks* hearing was clearly premature. Moreover, Christiana had not made any showing that statements made in the affidavit to obtain the warrant

were false. Therefore, Christiana was not entitled to a *Franks* hearing (id. 8, 9). Regarding EPA's jurisdiction to inspect, the Court pointed out that the Permit under which Christiana operated remained in effect for five years and that CWA § 308(a) allowed the EPA to enter and inspect for possible violations during the term of the Permit. The Court said that Christiana's Notice of Intent operated as its consent to the Permit conditions and thereby, made it subject to EPA's review and investigation of the Site (id. 9). When potential violations of the Permit (e.g., continued construction) and the CWA were evident, the Court held that under § 308 of the CWA and the facts presented, EPA had the right to confirm whether there were ongoing construction [activities] and associated CWA violations, regardless of when the Permit expired (id. 10). The Court ruled that under the law and the circumstances EPA's jurisdiction to inspect the Site clearly exists. The Court rejected as unfounded Christiana's claim that EPA was acting as a "stalking horse" for New Castle County, holding that Christiana had failed to assert evidence of the alleged conspiracy and that the mere fact a County inspector accompanied EPA on the inspection of the public areas [on March 9, 2004] did not support a conspiracy claim. The motion to quash was denied.

III. COMPLAINT, ANSWER AND MOTIONS

The next evident developments were Complainant's issuance of the complaint on September 29, 2005, and Respondents filing of an answer under date of October 27, 2005. As indicated supra, the answer included two motions, a "Motion to Suppress and Dismiss Allegations Arising From Unlawful Search" and a "Motion to Dismiss Acierno Completely and Christiana Partially" (Answer, ¶¶ 123-135). Because these Motions are being addressed herein, it is unnecessary to consider Complainant's objections to the form of the Motions.[8] Complainant notes, however, that Respondents' answer labels it as such and that the certificate of service accompanying the answer makes no reference to motions (id. 2). Complainant further notes that Respondents' Motion to Suppress appears to be a request for a *Franks* hearing on evidence gained during the May 4 inspection pursuant to the warrant and emphasizes that Respondents have not included supporting affidavits or offers of proof as required by *Franks.* Finally, Complainant points out that Respondents have submitted the same brief in support of the present Motion to Suppress and Dismiss Allegations Arising From an Unlawful Search as they did in support of the Motion to Quash Administrative Warrant and to Exclude Inspection Findings addressed to the District Court in Delaware and that they have not addressed the Magistrate Judge's opinion denying that motion. Additionally, Complainant says that Respondents' Motion to Dismiss is similarly ill founded in that Respondents have in paragraphs 126-35 made bare allegations as a basis for dismissal, but have failed to provide supporting documentation as required by Rule 22.16(a)(4) (id. 3, 4).

In his Reply to Portions of Respondents' Answer Captioned as "Motions", Complainant contends that the motions should be treated as improperly submitted, or, alternatively, the motions should be denied (Reply, hereinafter "Response", dated November 23, 2005). Complainant argues that Respondents' Motion to Suppress and to Dismiss Allegations Arising From an Unlawful Search should be denied, because they are at heart a motion to suppress

[8] Motion for a More Definite Statement Or, In the Alternative, a Motion For Leave to file a Late Reply, dated November 23, 2005.

evidence obtained by EPA arising from an inspection of the Christiana Town Center pursuant to a search warrant (Response at 2). Complainant says that violations alleged in the complaint are based in part on evidence obtained during the May 4 inspection pursuant to the administrative warrant. Complainant points out that, although Respondents may in this administrative proceeding challenge the admissibility of evidence and the weight to be accorded to it, suppression of a warrant issued by a Federal civil court is not a vehicle available herein (id. 3). Moreover, Complainant alleges that Respondents have not provided an offer of proof as required by *Franks*, i.e., they have not provided affidavits or otherwise reliable statements of witnesses nor have they explained their absence.

Respondents' Motion to Dismiss Acierno Completely and Christiana Partially is included in paragraphs 126 through 135 of the answer. With respect to Mr. Frank Acierno, paragraph 127 of the answer alleges that he has not been legal title owner of lands constituting the Site during the course of the operative time period at issue in this action. Indeed, it is alleged that on or about April 27, 2001, Mr. Acierno conveyed his interest in the Site to Christiana Town Center, LLC pursuant to a Deed recorded in the Office of the Recorder of Deeds in and for New Castle County at Instrument No. 2001-04-27-0030635. Respondents argue that Mr. Acierno should be dismissed from this action entirely, upon the ground that he has been improperly named in his personal capacity.[9]

Additionally, Respondents allege that much of the area which EPA alleges Christiana is responsible for has not been owned by Christiana for more than two and a- half years. It is alleged that on or about December 12, 2002, the undeveloped portion of the Site, consisting of approximately 25 acres, was conveyed by Christiana to CTC Phase II, LLC in a Deed recorded in the Office of the Recorder of Deeds in and for New Castle County at Instrument No. 2002-12-160120414 (id. ¶128). Respondents allege that Christiana Town Center, LLC and CTC Phase II, LLC are Delaware limited liability companies and that, pursuant to the Delaware Limited Liability Company Act, (6 Del. C. § 18- 303(a)) limited liability companies are responsible for all their obligations and liabilities but no member or manager of a limited liability company shall be obligated personally for any such obligation or liability of a limited liability company solely by reason of being a member or acting as a manager of the limited liability company (emphasis added).[10] Respondents contend that Acierno may not be held personally liable for the acts or omissions of either.

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[9] Id. ¶ 135. It is noted, however, that Respondents have admitted that Frank E. Acierno is the owner of Christiana Town Center, LLC (Answer. ¶ 4). Moreover, as noted infra, Mr. Acierno could be held personally liable, if he were shown to be the one in control and the only one making decisions for the corporation without reaching the question of whether there are grounds for "piercing the corporate veil".

[10] Respondents fail to address that, although the word "solely" in this provision indicates that a member or manager will not be liable for the debts, obligations, or liabilities of a Delaware LLC for only acting as a member or manager, "other acts or events could result in the imposition of liability upon or assumption of liability by a member or manager" (*Pepsi-Cola Bottling Co. of Salisbury, MD v. Handy*, C.A. No. 1973-S, 2000 Del. Ch. LEXIS 52, *10-11 (Del. Ch. 2000)). The use of the word "solely" means any reason beyond membership is sufficient to allow for members of an LLC to be personally liable.

Complainant alleges that it has considerable evidence that both Respondents were extensively involved in the control of development of the Site. For example, Complainant points out that on November 17, 1998, Mr. Acierno signed the Notice of Intent ("NOI", Exhibit 5) submitted to the DNREC seeking coverage under the NPDES General Permit Program Regulations Governing Storm Water Discharges Associated with Industrial Activity ("General Permit"). Complainant says that the relevant portion of the General Permit is attached as Exhibit 5 to the affidavit supporting the United States' application for a search warrant (Response, Exhibit 1). Complainant also points out that Mr. Acierno certified two Erosion and Sediment Control Plans (Response, Exhibits 6 and 7) submitted to New Castle County in part to satisfy the requirements of the General Permit (Response at 7). The former plan was certified by Mr Acierno on April 23, 2002, and approved by the County on April 24, 2002, while the second Plan (Exhibit 7) was certified by Mr Acierno on January 10, 2003, but does not indicate approval by the County.

Concerning Christiana, Complainant points out that the search warrant issued by the Magistrate Judge covered both the property owned by Christiana and the property Christiana now contends is owned by CTC Phase II, LLC.[11] Complainant notes that the search warrant (Exhibit 2) authorizes EPA to inspect the "undeveloped and partially developed" areas of the Site (id. 2, 3). Complainant further notes that Christiana was the moving party in the Motion to Quash and that CTC Phase II, LLC was not a party to the Motion and was not mentioned therein. Additionally, Complainant alleges that the conclusion Christiana was responsible for the entire Site is consistent with representations made to EPA in letters, dated March 2 and March 8, 2004, which discuss EPA's request for access to private parts of the Site (Tabbed Exhibits B and C to Answer). Complainant emphasizes that the letters refer to the entire Site and do not state or imply that Christiana was not responsible therefor. Moreover, Complainant says that, if as Respondents now allege, the undeveloped portion of the Site was transferred to CTC Phase II, LLC, they have not submitted any documentation that CTC Phase II, LLC sought NPDES General Permit coverage for the property.

Complainant alleges that Christiana has represented that it recognizes the requirements of the Clean Water Act and of the General Permit and asserts that Respondents as permittees are responsible for discharges from the Site (Response at 8). Complainant contends that Respondents' bare allegations do not resolve the issue of control of, and liability for, discharges from the Site and argues that, if the Motion to Dismiss in the answer is entertained as a motion, the Motion should be denied.

Respondents filed a "Reply" to what was labeled as "EPA's Response to Motion to Dismiss and Motion to Suppress", under date of December 8, 2005 ("Reply"). Disputing

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[11] Response at 7. It is noted that the Deed attached to Respondents' Reply to Complainant's Response to their Motions reflects that the grantee in the Deed, dated December 12, 2002,, from Frank E. Acierno is CTC East, LLC, rather than CTC Phase II, LLC. Moreover, CTC East, LLC is a party to the Settlement Agreement and Mutual Release, referred to infra, while CTC Phase II is not.

Complainant's contention that the Motion to Suppress is not supported by allegations of falsehood or reckless disregard for the truth, Respondents allege the Motion was in fact supported by voluminous documents and legal argument that Charles Schadel misrepresented facts in an intentional effort to obtain a search warrant. According to Respondents, he did so notwithstanding the fact that all evidence indicated that EPA had no legal jurisdiction to inspect the Site and that the Site was in full conformance with all legal requirements at the time.[12] Additionally, Respondents assert that the "prior violations" alleged by Mr. Schadel were established to be stayed pursuant to ongoing challenges to prior New Castle County violation findings.[13] Respondents allege that Schadel knowingly misrepresented to the Court that EPA had jurisdiction over the Site despite the fact that he was fully aware based on prior discussions that EPA's jurisdiction had ceased in November of 2003, a number of months prior to filing his Affidavit in support of the application for a search warrant (id. 3). This contention is dependent on approval of final site stabilization in accordance with Delaware Sediment and Storm Water Regulations (§ 9.1.02.6 (B). Respondents' assertion that final stabilization of the Site had occurred is apparently based on CCR documents, dated October 7, 2003, and October 13, 2003 (supra, note 2). As indicated supra note 12, allegations in the proposed Amended Complaint are to the effect that construction activities at the Site were ongoing.

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[12] This appears not to recognize the fact the Certified Construction Review Reports relied upon by Respondents are dated within one week of each other (October 7 and October 13, 2003), and that there are other allegations that Christiana's own reports to the County indicated violations of the General Permit (Schadel Affidavit at ¶ 10; Opposition of United States to Motion To Quash at ¶ 12). It should also be noted that ¶ 65 of the proposed Amended Complaint alleges that 22 weekly CCR Reports for the Site, dated March 4, 2003 to August 4, 2003, September 7, 2003, and September 25, 2003, stated that conditions at the Site were in noncompliance or unsatisfactory.

[13] Id 2. It is not clear whether the challenges referred to were made in ongoing litigation between DNREC and Christiana in the Delaware Chancery Court or perhaps in administrative proceedings before the DNREC. In this regard, it should be noted that the proposed Amended Complaint refers to Notice of Rule to Show Cause Decision, dated March 18, 2002, issued by New Castle County to Respondent Acierno, which cited violations of the "September 2001 Plan" and revoked the approval of that Plan (Amended Complaint, ¶¶ 41-45). The proposed Amended Complaint also recites that on or about April 3, 2002, Respondents developed and submitted to NCCDLU Application No. 2000-1453 for approval of the Site's Sediment and Stormwater Plan, that this Plan was signed by Mr. Acierno and approved by the NCCDLU on April 24, 2002, that on December 20, 2002, New Castle County issued a Notice of Post-Deprivation Show Cause Decision which revoked the approval of the April 2002 Plan, that on or about January 10, 2003, Respondents submitted a revised Plan to NCCDLU ("January 2003 Plan"), that this Plan was signed by Mr. Acierno, that on January 30, 2003, NCCDLU issued a Notice of Rule to Show Cause Decision, which recited some 27 violations at the Site and ordered Respondent, Acierno, to submit a revised Plan by February 7, 2003, that on April 30, 2003, the New Castle County Board of License and Review upheld the requirement for a revised Plan and the findings of violations in the January 2003 Show Cause Decision and that on December 16, 2004, the Delaware Supreme Court upheld the Board's April 30 decision (Amended Complaint, ¶¶ 46-59).

Referring to Complainant's contention that the Motion to Dismiss should be denied because Respondents have not presented any evidence of the alleged property transfers, Respondents assert that the ALJ may take judicial notice of public documents. In any event, attached to the Reply is a copy of a Deed, dated April 17, 2001, wherein Frank E. Acierno, as party of the first part, grants and conveys to Christiana Town Center, LLC, as party of the second part, "ALL that certain lot, piece or parcel of land situate in White Clay Creek Hundred, New Castle County, State of Delaware, as shown on the Record Resubdivision Plan for 'Christiana Town Center' prepared by Karins and Associates, Professional Engineers and Land Surveyors, dated October 26, 2000, recorded…." , followed by a more particular description of the property. Also attached to the Reply was a copy of a Deed, dated December 12, 2002, wherein Frank E. Acierno, as party of the first part, grants and conveys to CTC East, LLC, as party of the second part "All that certain tract or parcel of land containing ± 27 acres, situate in White Clay Creek Hundred, New Castle County, State of Delaware, shown as 'Other Lands of Frank E. Acierno' on the Subdivision Plan for 'Christiana Town Center' prepared by Karins and Associates, Professional Engineers and Land Surveyors, dated November 13, 2002 and recorded…."The property was further bounded and described in EXHIBIT A attached thereto and made a part thereof.

The mentioned Deeds appear to cover the Site at issue herein. While Respondents acknowledge that Mr Acierno signed the NOI in 1998, they contend that this is because he was the owner of the property at the time. They allege, however, that because of subsequent conveyances, he was no longer the owner of any of the premises at issue during the operative time period from which the alleged violations arise (Reply at 5). According to Respondents, the bottom line is that, if the Deeds show that they were not the owners of the property on which the alleged violations occurred, they cannot be found liable for the alleged wrongs of others.

DISCUSSION

A. MOTION TO SUPPRESS

In addressing Christiana Town Center's Motion to Quash Administrative Warrant and to Exclude Inspection Findings , the U.S. District Court for the District of Delaware treated the Motion as one to suppress, but did not reach the United States' argument that questions of suppression should not be considered until the government seeks to use the evidence, *In re Search Warrant*, 2004 WL 1368848 (D.Del. 2004). Rather, the Court relied on the rule that before judicial review of a motion to suppress was proper, the moving party must exhaust all administrative remedies, which Christiana had failed to do here. The Court held that the Motion to Suppress should be denied because it was premature (id.). In a quite similar case, a motion to suppress was granted upon the ground that FIFRA § 9 only authorized inspection of establishments where pesticides were held for distribution or sale and no pesticides were found at the establishment searched pursuant to an administrative warrant.[14]

[14] *Sporicidin International ,Docket No. FIFRA-88-H-02, 1988 EPA ALJ LEXIS 14 (ALJ, November 1, 1988*), where evidence seized during a search pursuant to an administrative warrant

The rule that questions of suppression should not be addressed until the Government seeks to use the evidence, i.e., proffers it into evidence at a hearing or trial, is considered to be firmly grounded in the interests of judicial economy and will be applied here. Respondents' Motion to Suppress will be denied.

B. MOTION TO DISMISS RESPONDENT, FRANK E. ACIERNO COMPLETELY AND CHRISTIANA PARTIALLY

Respondents rely on a deed, dated April 27, 2001 (supra at 11), to support the contention that Mr. Acierno had no ownership interest in the property comprising the Site during the operative time period and thus may not be held personally liable for the alleged violations. Respondents also rely on two deeds, dated December 12, 2002, to support the contention that Christiana had no interest in the property subsequent to that date (Attachments to Respondent's Reply to EPA's Response to Motion to Dismiss and Motion to Suppress). In one of the mentioned deeds. Frank E. Acierno conveyed to CTC East, LLC a tract or parcel of land containing ± 27.64 acres, situate in White Clay Creek Hundred, New Castle County, State of Delaware, shown as "Other Lands of Frank E. Acierno" on the Subdivision Plan for "Christiana Town Center", otherwise known as "the Property" and apparently, the undeveloped portion of the Site.

In the third deed**,** Christiana Town Center, LLC conveyed to CTC PHASE II, LLC the land conveyed to Christiana by Mr. Acierno in the deed, dated April 27, 2001, referred to above. Contending that Respondents had no ownership interest in the property during some or all of the relevant time periods alleged in the Complaint, Respondents contend that the Complaint as to Frank E. Acierno should be dismissed completely and that the Complaint as to Christiana should be dismissed as to all violations occurring subsequent to December 12, 2002.

Pursuant to CWA § 402 and 7 Delaware Code Chapter 60, and the regulations promulgated thereunder, the DNREC issues permits for discharges to waters of the United States in Delaware. On or about September 15, 1988, DNREC issued Regulations Governing The, Control of Water Pollution, Section 9 of which is The General Permit Program (supra note 1). Subsection 1 is the Regulations Governing Storm Water Discharges Associated With Industrial Activity and are referred to as the General NPDES Storm Water Permit Program. The General NPDES Storm Water Program is divided into 14 Parts. In Part 1, the baseline of the General

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issued by the Superior Court of the District of Columbia was suppressed upon the ground that FIFRA § 9 only authorized inspection of establishments where pesticides were held for distribution or sale, no pesticides were found at the establishment searched, and evidence that pesticides were at the establishment was stale and outdated. The Judicial Officer, while expressing skepticism as to the validity of the suppression order, nevertheless, did not rule on the legality of the search and, like the ALJ, found it unnecessary to rely on evidence obtained by the search in sustaining the assessment of a penalty against respondent (*In the Matter of Sporicidin International*, FIFRA Appeal No. 88-2, 1991 EPA App. LEXIS 3, 3 E.A.D.589 (JO June 4, 1991)).

NPDES Storm Water Permit Program is established (§ 9.1.01) and Parts 2 through 14 apply to specific categories of storm water industrial discharges. Part 2 is the Special Conditions for Storm Water Discharges Associated With Land Disturbing Activities (§ 9.1.02).

"Land Disturbing Activities" means "a land change or construction activity for residential, commercial, silvicultural, industrial and institutional land use which may result in soil erosion from water or wind, or movement of sediments or pollutants into State Waters or onto land in the State, or which may result in accelerated stormwater runoff, including, but not limited to, clearing, grading, excavating, transporting, and filling of land." (§ 9.1.01.0(13)).

Additionally, § 9.1.01.1 "Coverage provides 'A. This Subsection shall apply to the following categories of industrial activities' … (x) Construction activities including clearing, grading and excavation activities". Subsection 9.1.01.1 B "Elgibility" provides in pertinent part:

> "1. This Subsection covers all new and existing discharges that are composed in whole or in part of storm water discharges associated with industrial activities.
> ……
> 4. No person shall discharge storm water associated with industrial activity except as authorized by an individual NPDES permit or this Subsection……."

DISCUSSION

Respondents' argument is rejected.

The CWA prohibition on the discharge of pollutants from point sources to waters of the United States without a permit is not limited to owners. Rather CWA § 301 (a) (33 U.S.C. § 1311) is more broadly applicable to "any person" providing that "Except in compliance with this section and sections 1312, 1316, 1317, 1328, 1342 and 1314 of this title, the discharge of any pollutant by any person shall be unlawful". The fact that various sections of the Act refer to "owners or operators of point sources" re-inforces the conclusion that the prohibition on discharges except in compliance with a permit is not limited to owners. See, e.g., § 301 "Effluent limitations", in particular paragraphs(c) and (g); § 306 "National standards of performance" which contains a definition of "owner or operator" for purposes of that section;[15] and § 308 "Records and reports; inspections, paragraph (a)(A) of which provides that the Administrator shall require the owner or operator of any point source to, inter alia, "(i) establish and maintain such records, (ii) make such reports,…" See also § 311 "Oil and hazardous substance liability", § 311(a) which contains definitions of "owner and operator", "onshore facility", and "offshore facility".

[15] Section 306 is entitled "National standards of performance" and § 306(a) "Definitions" provides in part: "(4) The term 'owner or operator' means any person who owns, leases, operates, controls, or supervises a source."

It is also evident that the DNREC General Storm Water NPDES Permit Program applies to any person who discharges or proposes to discharge storm water associated with industrial activities, in this instance construction activity, and is not limited to owners.[16]

Secondly, there is substantial evidence of Mr. Acierno's involvement with the Site both prior and subsequent to April 27, 2001, the date he executed a deed purportedly transferring his interest in the Site to Charistiana Town Center, LLC. The NOI, dated November 17, 1998, signed by Frank E. Acierno, identifies the project name as "Christiana Towne Centre (sic) 273 Mall" and identifies Mr. Acierno as the "owner/developer". The NOI provides that "Any person identified in the Sediment and Management Plan as the owner(s)/developer(s) and or agent and designer shall sign a copy of the following certification prior to commencing any land disturbing activities: [17] The NOI further provides: "In addition, the Owners/Developer(s) shall notify all contractors engaged in site grading or other site work of the contractors obligations under the Clean Water Act and the existing State law."

Mr. Acierno is identified as the owner in the Erosion and Control Plan, certified by Frank E. Acierno as owner on April 23, 2002, approved by the NCCDLU on April 24/2002, (Response, Exhibit 6). In this regard, the proposed Amended Complaint alleges that on December 20, 2002, the NCCDLU issued a New Castle County Code Official Notice of Post-Deprivation Show Cause Decision ("December 2002 Show Cause Decision") which revoked the approval of the 2002 Plan (id. ¶¶ 50, 51). The Erosion and Sediment Control Plan, dated 12/23/02, also identifies Frank Acierno as the owner and bears the owner's certification by Frank E. Acierno and the date of January 10, 2003 (Response Exhibit 7). As noted supra, the parties disagree as to whether the December 2002 Plan was approved. This may be a moot point, however, because the proposed Amended Complaint alleges that on January 30, 2003, the NCCDLU issued a Notice of Rule to Show Cause decision ordering Respondent Acierno ("January 2003 Show Cause Decision") to submit a revised Plan by February 7, 2003, and finding 27 violations at the Site (id. ¶¶ 55 and 56).It is further alleged that on April 30, 2003, the New Castle County Board of License Inspection and Review ("Board") upheld the requirement for a revised plan and the findings of violations in the January 2003 Show Cause Decision. On December 16, 2004, the Delaware Supreme Court upheld the Board's April 30 decision (*Christiana Town Center, LLC v. New Castle County,* unreported (Del. Sup Ct 200), aff'g *New Castle County v Christiana Town Center, LLC, 2004* WL 1835103 (Del Ch 2004), supra.note 13) See also Amended Complaint, ¶¶ 57 and 58).

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[16] See 40 C.F.R. § 122.21(a) which makes it clear that the obligation to apply for a permit in accordance with 40 C.F.R. § 122.26(c) applies to any person who discharges or proposes to discharge pollutants such as stormwater.

[17] The certification is as follows: "I/we certify under penalty of law that I understand the terms and conditions of the Delaware National Pollutant Discharge Elimination System (NPDES) General Permit Regulations for Storm Water Discharges Associated with Land Disturbing Activities."

It is worthy of note that the initial Complaint alleges that Respondent Frank E. Acierno is the owner of Christiana Town Center, LLC and that Respondents have admitted this allegation (Answer, ¶ 4). It is also of interest that Frank E.Acierno is the only signatory to the three deeds in the record and that he appears as the only signatory on behalf of the§ non-government parties to the SETTLEMENT AGREEMENT AND Mutual Release. It is unnecessary to "pierce the corporate veil"in order to hold Mr. Acierno liable for the violations if, for example, he were shown to be the person in control and the only one making decisions for the corporation. See, e.g., *Southern Timber Products, Inc.*, RCRA (3008) Appeal No. 89-2, 3 E.A.D. 880 (EAB, February 28, 1992) (Secretary/Treasurer and 10% shareholder of corporation not shown to be an "operator" and thus not personally liable, where the evidence failed to shows that he exercised active and pervasive control over facility operations and acted merely as liaison between the corporation and State regulatory officials); *Roger Antkiewicz & Pest Elimination Products of America, Inc.,* FIFRA Appeal Nos. 97-11 & 97-12, 8 E.A.D. 218 (EAB, March 26, 1999) (individual held personally liable because of his involvement and oversight of all aspects of corporation's operations); and *Safe & Sure Products, Inc*., FIFRA Appeal No.98-4, 8 E.A.D. 517 (EAB, July 27, 1999) (president and owner of corporation individually liable because he was the only one making decisions for the corporation). See also *United States v. Gulf Park Water Co, Inc.,* 952 F. Supp. 1056 (S.D. Miss. 1997) (corporate officers may be found individually liable in Clean Water Act cases; general manager held individually liable because he participated in management operations, acted as general manager and held himself out as an operator; a second individual was held personally liable because he was the sole shareholder of the parent company, exercised daily control over the facility and held himself out as an operator).

In view of the above, it is apparent that disposition of the motions to dismiss must await the exposition of evidence as to the extent of Mr. Acierno's involvement with and control of operations at the Site. Inasmuch at it appears that Frank E. Acierno is the sole owner of Christiana Town Center, LLC, the existence of Christiana as a separate corporate entity would not insulate Mr. Acierno from liability, if he were shown to the only decision-maker for Christiana. Respondents rely on the Delaware Limited Liability Company Act for the proposition that Mr. Acierno may not be held personally liable for the acts or omissions of either Christiana or CTC Phase II, LLC and that Christiana may not be held liable for the acts or omissions of CTC Phase II, LLC (Answer, ¶¶ 129, 130, and 131). Respondents have overlooked or ignored the word "solely" in the cited section of the Delaware Limited Liability Company Act (§18-303(a)), which would not preclude liability for acts other than simple membership or being a manager (supra, note 10). Accordingly, if Mr. Acierno were shown to be the only or principal one making decisions for Christiana, that the Delaware Limited Liability Company Act would provide no barrier to him being held personally liable for such decisions that resulted in violations of the General Permit Program. In any event, the Delaware statute would not trump federal law on the subject. It follows that Respondents' Motions to Dismiss Acierno Completely and Christina Partially are lacking in merit and will be denied.

IV. MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

Under date of January 30, 2006. Complainant filed a Motion for Leave to File an Amended Complaint and a Memorandum in Support of the Motion ("Memorandum"). The Memorandum states that the Amended Complainant would add a third respondent to this

enforcement action, i.e., CTC Phase II, LLC ("CTC"), because Respondents' answer and their Reply to Complainant's Response to Motion to Dismiss and Motion to Dismiss indicate that CTC owned a portion of the Christiana Town Center Site during some of the period during which the violations at issue occurred (id. 1, 2). The Memorandum points out that the amended complaint alleges that CTC shares responsibility for the storm water discharges at the Site which violated the CWA and that, in addition, CTC violated the Act by discharging storm water from the Site without NPDES coverage. The Memorandum notes that according to paragraph 128 of the answer, CTC is the current owner of part of the property which comprises the Site and that a copy of the deed attached to the Reply shows that this has been the case since December 12, 2002. Accordingly, CTC owned a portion of the Site while violations of the Clean Water Act took place and CTC, like Acierno and Christiana Town Center, LLC, was an operator at the Site while the violations took place.[18]

Under date of February 14, 2006, Respondents filed a Memorandum in Support of Their Response in Opposition to Complainant's Motion for Leave to File an Amended Complaint ("Opposition"). Respondents point out that the proposed Amended Complaint sets forth two primary modifications to the original Complaint: 1) adding CTC as an additional Respondent and making associated allegations against it; and 2) modifying certain pleadings contained in the complaint to reflect the Region's understanding of the changing real property ownership at the Site while the violations [allegedly] occurred. A Deed attached to Respondents' Response To Motion To Dismiss And Motion To Suppress ("Reply") purports to evidence an Acierno interest in a portion of the Site until December 12, 2002. Respondents allege, however, that this Deed is in error (id. note 1). They say that another Deed, dated April 27, 2001, attached to the Reply establishes that the entirety of the Site was conveyed to Respondent Christiana Town Center on that date. Additionally, Respondents point out that the proposed Amended Complaint does not seek to modify the original Complaint so as to eliminate certain allegations against Christiana. According to Respondents, the lands from which EPA's claims arise, i.e., those located at the rear of the Site, have not been owned by Christiana since December 12, 2002; hence, the allegations of the Complaint regarding alleged violations arising from an inspection of the Site conducted pursuant to a secretly issued "ex parte" administrative search warrant in May of 2004 may not properly be brought against Christiana. For the same reason, that is, the fact that Christiana did not own the property at the time, Respondents assert that Christiana is not responsible for an alleged violation on December 20, 2002, nor is Christiana responsible for alleged plan deficiencies occurring in 2003 (id. 2-3).

More importantly, Respondents say that the draft Amended Complaint does not indicate that there is any evidence that CTC owned lands were the situs of any of the alleged violations (id. 3). According to Respondents, record subdivision and development plans attached to the

[18] Paragraph 16 of the proposed Amended Complaint alleges that according to Paragraphs 128 and 131 through 135 of Respondents' Answer, CTC is the owner of part of the Site and responsible for the acts or omissions that have occurred on that portion of the Site. Additionally, Paragraph 36 of the proposed Amended Complaint alleges that at all times relevant to this Amended Complaint, Respondents [including CTC] have conducted construction activity at the Site.

Reply, reviewed in combination with the Deeds attached thereto, clearly delineate the ownership configuration of the Site during the operative time period at issue in the complaint.

According to Respondents, EPA's claims in this proceeding rely extensively and exclusively on positions taken previously by the County. Respondents argue that now that the County has concluded that the site is fully compliant, and does not contest the past action or condition of the Site, none of the evidence upon which the Complaint is founded may be relied upon for the purpose of pursuing any separate or independent proceeding. Therefore, Respondents contend that the ALJ lacks subject matter jurisdiction to hear the now finally resolved issues.

Secondly, Respondents contend that the proposed amendments are futile because no claim is stated against CTC.

Respondents note that in the proposed Amended Complaint, EPA alleges that CTC is the owner of part of the property that comprises the Site and thus responsible for acts or omissions that occurred on that portion of the Site. Respondents allege, however, that the proposed Amended Complaint never expressly alleges that any discharges occurred from that portion of the Site owned by CTC during the period relevant to this proceeding and that, consequently, the Amended Complaint does not state a claim upon which relief may be granted (id. 6-7).

Thirdly, Respondents contend that the amendment to the Complaint would be futile on the grounds of inconsistency and the resultant disproof by Complainant of his own averments.

Respondents allege that the Amended Complaint, if permitted, would impermissibly create a tangled web of inconsistent allegations and assertions of liability (id. 7). Respondents point out that Count I would allege that all three Respondents failed to properly stabilize the Site; Count II would allege that all three Respondents failed to obtain an approved sediment and storm water plan, or, in the alternative failed to stabilize the Site, maintain the forebay, and implement other requirements of the plan; and a new Count III would assert that CTC alone failed to apply for an NPDES general permit. Respondents argue that these propositions are both logically and legally impossible, and the Amendment should therefore be denied. Respondents state that Complainant does not explain how CTC can be responsible for complying with a permit that it allegedly never obtained (id. 8). Nor, according to Respondents, is there any explanation of why Acierno's permit covers Christiana but does not cover CTC. Respondents again complain that the proposed Amended Complaint does not dismiss Acierno in spite of the evidence that he did not own any portion of the Site since long before any of the alleged violations occurred. Respondents argue that the proposed Amended Complaint should not be permitted, because it would create legally inconsistent positions which would result in the dismissal of the action in its entirety (id. 8).

Respondents argue that none of the Part 22 Rules [Consolidated Rules of Practice] permit Complainant to state claims in the alternative. Rather, Respondents assert that the Agency's complaint must succinctly state from whom penalties are being sought and the precise bases for such enforcement relief. Respondents quote from Rule 22.14 entitled "**Complaint"** which provides in pertinent part "(a)…Each complaint shall include:…(2) Specific reference to each

provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated;..(3) A concise statement of the factual basis for each violation alleged;…" Accordingly, Respondents contend that the proposed Amended Complaint should not be allowed, because it would contravene the express pleading requirements imposed upon the Agency by the [Consolidated Rules of Practice] (id.).

In conclusion, Respondents argue that leave to file the proposed Amended Complaint should be denied on the grounds that it is futile because it fails to state a claim, cannot be pursued due to lack of subject matter jurisdiction, and will cause undue prejudice (id. 11).

A. COMPLAINANT'S REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

Complainant filed a " Reply to Respondent's Response to Complainant's Motion for Leave to File an Amended Complaint" ("Reply") under date of February 24, 2006. Complainant points out that Respondents contend that that the Motion for Leave to File an Amended Complaint should be denied as futile based on various theories. Complainant explains that the Amended Complaint would add a third party Respondent, CTC to this proceeding. Complainant asserts that CTC is liable because it owned a portion of the Christiana Town Center Site, because it was an operator at the Site, and because it discharged without NPDES permit coverage (Reply at 1).

Referring to Respondents' contention that amendment of the Complaint would be futile because the ALJ lacks subject matter jurisdiction as a result of a settlement agreement ("Agreement") between Respondents and, among others, New Castle County, Complainant argues that res judicata and collateral estoppel only bar claims or issues where a final adjudication of the claim has occurred (id. 2). Complainant emphasizes that here we do not have any judicial findings in favor of the Respondents, but only a settlement agreement. Secondly, Complainant asserts that, even if res judicata or collateral estoppel might in some way bar EPA's claims, the Agreement provides no support for the contention that the County recognized Respondents had complied in the past. Complainant points out that, without conceding liability, Respondents agreed to pay a penalty for past violations. Additionally, Complainant notes that at the time the Agreement was signed, the County had concerns about certain aspects of Respondents' current compliance at the Site (id 2, 3). See infra for sections of the Agreement requiring certification of compliance by Acierno's engineer.

Regarding Respondents' argument that Complainant's claims are futile because they are inconsistent, Complainant says that it does not agree that the claims are mutually exclusive (Reply at 3). However, even if the claims are mutually exclusive, Complainant argues that there is precedent for such claims. Acknowledging that the Part 22 Rules do not expressly provide for alternative claims, Complainant points out that the Environmental Appeals Board has held that the Federal Rules of Civil Procedure, while not binding on administrative agencies, often provide useful and instructive guidance in applying the Rules of Practice, citing *City of West Chicago,* Docket No. CWA-5-99-013, 2000 WL 356387 (ALJ February 25, 2000). Complainant also points to *In Re Chemtron Corporation,* Docket No. RCRA-05-2001-0017, 2002 EPA ALJ

LEXIS 75 (ALJ December 2, 2002) where an ALJ agreed to consider inconsistent arguments. Therefore, Complainant argues that, because Fed. R. Civ. P. 8(e)(2) allows for inconsistent claims, the ALJ should do so here.

Secondly, Complainant points out that based upon Respondents' Answer and Reply, the [Amended] Complaint incorporates Complainant's understanding of the changing property ownership of the Site while the violations occurred (Memorandum at 3). Pointing to paragraphs 127 and 128 of the Answer, Complainant states that Christiana has owned part of the Site since 2001 and is the current owner of some of the property comprising Christiana Town Center. As noted supra, there are two deeds, dated December 12, 2002, in the record: by one deed Frank E. Acierno conveyed to CTC East a tract or parcel of land containing ± 27.64 acres shown as "Other Lands of Frank E. Acierno" on the Subdivision Plan for Christina Town Center, apparently the undeveloped portion of the Site; and a second deed by which Christiana Town Center, LLC conveyed to CTC a tract or parcel of land shown as Lot 1D on the Subdivision Plan for Christiana Town Center.[19] Complainant contends that Respondents Acierno and Christiana's liability for violations at the Site, and CTC's liability stem in part from their ownership of the Site and resulting responsibility for storm water discharges (id.). Referring to new paragraph 54 which alleges that the January 2003 Plan shows the placement of erosion and storm water controls over the entire Site including the undeveloped portion, presently owned by CTC, Complainant points out that, unlike the other two Respondents, CTC was not a permittee under the NPDES General Permit, and thus was discharging without NPDES coverage.

Complainant asserts that the Amended Complainant more closely reflects the facts as they are more likely to be shown at a hearing and, citing the rule that permission to amend a complaint will ordinarily be freely granted, asks for leave to file the Amended Complaint

Complainant filed a "Reply to Respondents' Response to Complainant's Motion for Leave to File an Amended Complaint, under date of February 24, 2006 ("Reply"). Complainant explains that the proposed Amended Complaint would add a third party Respondent, CTC to this proceeding. Complainant asserts that CTC is liable because it owned a portion of the Christiana Town Center Site, because it was an operator at the Site and because it discharged without NPDES permit coverage (id. 1). Referring to Respondents' contention that the ALJ lacks subject matter jurisdiction in this proceeding because of the settlement agreement between Respondents and, among others, New Castle County, Complainant argues that res judicata and collateral estoppel only bar claims or issues where there has been a final adjudication of the claim. Complainant emphasizes that here, we do not have any judicial findings, but only the Agreement (id. 2).

[19] Respondents allege that the deed attached to "Respondent's Reply To EPA's Response To Motion To Dismiss and Motion To Suppress" which purports to evidence an Acierno ownership interest in a portion of the Site until December 12, 2002, is in error as a deed, dated April 27, 2001, establishes that the entirety of the Site was conveyed to Respondent Christiana Town Center, LLC on that date (Memorandum in Opposition to Complainant's Motion For Leave to File an Amended Complaint at 2, note 1). Respondents allege that they are in the process of preparing a Corrective Deed to correct the error.

DISCUSSION

The general rule is that motions to amend pleadings are liberally granted where the interests of justice are thereby served and no prejudice to the opposing party results. See, e.g., *Foman v. Davis,* 371 U.S. 178 (1962). This rule is applicable in the administrative context, the Environmental Appeals Board having stated that "it adheres to the generally accepted legal principle that 'administrative pleadings are liberally construed and easily amended' and that permission to amend a complaint will ordinarily be freely granted." *Port of Oakland & Great Lakes Dredge and Dock*, MPRSA Appeal No. 91-1, 4 E.A.D. 170, 209, at 205 (EAB, August 4, 1992). See also *Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D 819 (EAB October 6, 1993) and cases cited (policy component of Fed. R. Civ. P. 15(a) that leave to amend a complaint shall be freely granted when justice so requires is applicable to Agency practice); *City of Orlando, FL,* Docket No. CWA-04-501-99, 1999 EPA ALJ LEXIS 63 (ALJ August 24, 1999) (interests of justice are served by amendments which present the real, or all of the issues, in a case and prejudice within the meaning of *Foman* requires a showing that respondent will be seriously disadvantaged in the presentation of its case); and *Service Oil, Inc.,* Docket No. CWA-08-2005-06, 2006 EPA ALJ LEXIS 15 (ALJ April 10, 2006) (no prejudice found where amended complaint cited an additional statutory basis for liability, but did not require any new or additional facts).

As indicated supra, Respondents have opposed the Motion upon various theories of "futility". Upon analysis, none of the grounds upon which Respondents rely to support the claim that the proposed amendments are futile is valid. It follows that Complainant's Motion for Leave to File An Amended Complaint will be granted.

Respondents' argument that the SETTLEMENT AGREEMENT AND MUTUAL RELEASE entered into between New Castle County, the Delaware Department of Transportation, Christiana Town Center, LLC, CTC East, LLC, Frank E. Acierno, and others bars the Administrator from pursuing any claims arising from or related to County proceedings at the Site is rejected. This is because the principles of Res Judicata (claim preclusion) and Collateral Estoppel (issue preclusion) upon which Respondents rely are only applicable where there has been a final adjudication of the claims. *Borough of Ridgway Pennsylvania,* CWA Appeal No. 95-2, 6 E.A.D. 479 (EAB, May 30, 1996), and cases cited. See also *Wego Chemical & Mineral Corporation,* TSCA Appeal No. 92-4, 4 E.A.D. 513 (EAB, February 24, 1993).

Moreover, it is well settled that even though a State program for the issuance of permits for discharges into waters of the United States has been approved by the Administrator pursuant to CWA § 402(b), enforcement action by the State does not preclude enforcement action by EPA. See CWA § 402(i) providing that nothing in this section shall be construed as limiting the authority of the Administrator to take action pursuant to section 1319 [CWA § 309 "Enforcement"] of this title.[20] See, e.g., *United States v. City of Youngstown,* 109 F. Supp 2d 739 (N.D. Ohio, 2000).

[20] CWA § 309(g)(6)(A)(ii), which precludes civil penalty proceedings where the State has commenced and is diligently prosecuting an enforcement action under comparable State law is by its terms not applicable to administrative penalty proceedings under § 309(g).

Complainant asserts that even if, res judicata and collateral estoppel might in some way bar EPA's claims, the Agreement provides no support for the argument that the County recognized that Respondents had complied in the past. Complainant points out that without conceding liability, Respondents agreed to pay a penalty. Moreover, Complainant says that at the time the parties signed the Agreement, the County had concerns about some aspects of Respondents' then current compliance, citing Section 2, Stablization of the Other Lands; Section 5, Slope Remediation; and Section 6, Remediation of the Stormwater Management Basin, providing for certification of compliance by Acierno's engineer. If Acierno's engineer is unable to make the specified certification, the cited sections make it clear that remediation work is required. The point here, of course, is that, contrary to Respondents' contentions, stabilization and other work at the Site appears not to have been completed. At the very least, this is an issue for resolution at a hearing.

Respondents' argument that no claim is stated against CTC overlooks Paragraph 16 of the proposed Amended Complaint which alleges that CTC as owner of part of the Site is responsible for the acts or omissions which have occurred on that portion of the Site (supra note 17). See also Paragraph 36, which alleges that at all times relevant to the Amended Complaint, Respondents [including CTC] have conducted construction activities at the Site and Paragraph 37, which alleges that storm water discharges flow, and at all times relevant to the Amended Complaint, have flowed from the Site's ditches, channels, swales, and pipes to Eagle Run, a tributary of the Christiana River. Additionally, Paragraph 70 of the Amended Complaint alleges that during the inspection [on May 4, 2004] EPA inspectors found evidence that storm water discharges from Site have included discharges of sediment to Eagle Run. These allegations are sufficiently broad to include construction activities on and discharges from the portion of the Site owned by CTC. In any event, the allegations would support the introduction of evidence that such is the case. If, as Respondents allege, record subdivision and development plans in conjunction with the Deeds clearly delineate the ownership and configuration of the Site during the operative time period, this is a matter that can be readily shown in the Answer, in pretrial proceedings, or at a hearing.

Regarding Respondents' argument that the claims against CTC are futile because they are inconsistent, Complainant says that it does not agree that the claims are mutually exclusive (id. at 3). In any event, Complainant points out that, although the Part 22 Consolidated Rules do not expressly provide for alternative claims, Fed. R. Civ. P. 8(e)(2) provides for claims or pleadings in the alternative. Complainant notes that under EAB precedent, (e.g, *Asbestos Specialists, Inc.*, supra) the Federal Rules of Civil Procedure may be used as guides in interpreting the Consolidated Rules and argues that alternative claims should be allowed here as well. This position is sufficiently reasonable as to warrant its acceptance.

Respondents have made no showing that granting the motion to file the Amended Complaint would be unduly prejudicial and this argument is rejected.

ORDER

1. Respondents' Motions to Dismiss and to Suppress are denied.

2. Complainant's Motion for Leave to File an Amended Complaint is granted.

3. Respondents, having received a copy of the Amended Complaint with Complainant's Motion shall, file an Answer thereto within 20 days of the service of this Order.

4. Rulings on Complainant's Motion to Strike Certain Portions of Respondents' Answer and Certain Affirmative Defenses will be forthcoming.

Dated this _____day of June 2006.

_____
Spencer T. Nissen
Administrative Law Judge.